

**Roselind Nelly a/p Marele v Welling Jidad****A**

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–32 OF  
2006–11

LAU BEE LAN J

**B**

18 OCTOBER 2006

*Land Law — Unlawful occupation — Action for recovery — Summary procedure — Allegation of creation of a trust disputed by the plaintiff — Allegation of grant of temporary gratuitous licence disputed by the defendants — Whether triable issues raised — Section 132 of the Sarawak Land Code (Cap 81) - — O 89 Rules of the High Court 1980*

**C**

*Trust — Whether a trust is created if there is no manifest in writing — Applicability of Statute of Frauds — Applicability of native customs — Whether triable issue raised — S 2 of the Application of Laws Ordinance (Cap. 2), Statute of Frauds*

**D**

*Civil Procedure — Summary Procedure — Dispute of facts — Whether originating summons procedure appropriate — Exercise of judicial discretion — O 18 & O 28 r 8(1) of the RHC*

**E**

*Evidence — Burden of proof — Fact especially within knowledge of accused — Evidence Act 1950, s 106*

**F**

The plaintiff's filed an originating summons to recover possession of all that parcel of land situated at 13 ½ Mile, Kuching/Serian Road, Kuching, containing an area of 6,071 square metres, more or less and described as Lot 725 Block 4 Sentah-Segu Land District ('the said Land'). The plaintiff contended that she as the sole registered proprietor of the land is entitled to possession and that the defendant and persons in occupation are without licence or consent. The defendant is the plaintiff's elder sister who was staying with her immediate family at a small portion of the said land before the said land was transferred to the plaintiff by her late mother. The plaintiff granted a temporary gratuitous licence to the defendant and her family to stay and occupy a small portion on the said land strictly on condition that the said temporary gratuitous licence was terminable at will. Sometime in the month of June, the plaintiff informed the defendant and her immediate family to leave the said land and she intended to sell it but the defendant and her family refused to vacate the said land. After the defendants disobeyed the legal notice to vacate the land, this action was filed. The plaintiff claimed that the land was transferred to her unconditionally and denied that the transfer was subject to any trust of whatsoever nature. The plaintiff's version is supported by the evidence of Lidat Anak Ache, Aisah binti Abdullah @ Meling A Juling and Julita Jidad, all half sisters of the plaintiff.

**G****H****I**

A The defendants replied that the said land originally belonged to her late grandmother and which was passed to her late mother, Marele anak Cyril. At that time when the Superintendent of Lands and Surveys wanted to issue the document of title of the said land, her late mother informed her that she would register under the plaintiff's name temporarily on behalf of her and her other siblings and that is the reason, the plaintiff's name appeared as the sole proprietor. She further stated she had never objected to this registration as she honestly believed that she and her siblings had interests and rights on the said land and that the plaintiff would hold the said land in trust for them. According to her, her late mother never told them the said land belonged to the plaintiff alone and the plaintiff never informed her about granting temporary gratuitous licence and the plaintiff encouraged her and her husband to build their own house (of about 1,260 square metres not including the fruit trees on the said land) and she even planted fruit trees that yielded fruits for many years. Welling anak Jidad's version regarding the said land was supported by the affidavit of Ah Jin anak Suamon, the elder sister of the plaintiff and the former who also said that the plaintiff was lying in stating that she had granted temporary gratuitous licence and she (Ah Jin) was dismayed upon receiving the plaintiff's letter of eviction and she had lodged a caveat on the said land registered on 21 November 2005

E **Held**, ordering that the originating summons be converted into a writ action and the parties do deliver their pleadings in accordance with O 18 of the RHC.

- F (1) The court agreed with the learned counsel's submission that the burden is on the persons occupying the land to prove that they have such licence or consent because of the wording of O 89 r 1 of the RHC which reads - 'without his (plaintiff's) licence or consent or that of any predecessor in title'. Furthermore, s 106 of the Evidence Act 1950 provides that 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him' (see paras 3 & 4)
- G (2) The defendants have to raise triable or arguable issues to resist the plaintiff's application under O 89 of the RHC which is for obtaining possession by summary procedure and which is governed by the same principles as those under O 14 of the RHC (see Federal Court case of *Shaheen bt Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 3 AMR 306) (see para 5).
- H (3) Based on the affidavit evidence, it cannot be denied that there is a dispute of facts between the plaintiff and the defendants and in this regard, the court is mindful of the principle advocated in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 regarding the duty of the trial judge pertaining to conflicting affidavit evidence. The crux of the defendants' allegation is that there is an expressed trust created over the said land on behalf of the siblings when the said land was transferred to the plaintiff by their late mother. Although it is not disputed that the said land is registered in the name of the plaintiff as proprietor on 22 May 1997 but there is a dispute regarding whether the plaintiff held the said land in trust for her siblings (see para 12).
- I (4) By virtue of s 2 of the Application of Laws Ordinance (Cap 2), the Statute of Frauds is applicable to Sarawak. Here, I agree with the submission of the

learned counsel for the defendants, Ms Jorai that even though the Statute of Frauds is applicable to Sarawak and whereby a declaration of trust must be manifested in writing, of great significance is the proviso to s 2 which states, inter alia, that 'statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary' (see para 14).

- (5) In the courts opinion, based on *Lee Phek Choo's case*, the Court has to give due regard to the circumstances in Sarawak and of its inhabitants including local circumstances and native customs in the application of the Statute of Frauds in Sarawak. It has been pointed out by the learned counsel for the defendants, the parties are natives from the Bidayuh community and which is not denied by the plaintiff. Since there is a dispute between the parties regarding whether the said land is being held in trust by the plaintiff and there is no evidence of how a trust is created by natives from the Bidayuh community, this to my mind is a triable issue to be ventilated at a trial proper (see para 16).

**[Bahasa Malaysia summary]**

Plaintif telah memfailkan saman pemula untuk mendapatkan kembali milikan keseluruhan bidang tanah yang terletak di Batu 13 ½, Jalan Kuching/Serian, Kuching, yang berkeluasan kira-kira 6,071 meter persegi dan dikenali sebagai Lot 725 Blok 4 Daerah Sentah-Segu ('tanah' tersebut). Plaintif menegaskan bahawa beliau sebagai pemilik tunggal berdaftar tanah tersebut adalah berhak kepada milikan dan bahawa defendan dan mereka yang mendiami adalah tanpa lesen atau kebenaran. Defendan adalah kakak plaintiff yang tinggal dengan keluarga terdekatnya di bahagian kecil tanah tersebut sebelum tanah tersebut dipindahkan kepada plaintiff oleh mendiang ibunya. Plaintif telah memberikan lesen sementara secara percuma kepada defendan dan keluarganya untuk tinggal dan menduduki bahagian kecil di atas tanah tersebut atas syarat yang ketat bahawa lesen sementara percuma tersebut adalah boleh ditamatkan bila-bila masa. Sekitar bulan Jun, plaintiff telah memberitahu defendan dan keluarga terdekatnya untuk meninggalkan tanah tersebut dan beliau hendak menjualkannya tetapi defendan dan keluarganya enggan untuk mengosongkan tanah tersebut. Selepas defendan mengingkari pemberitahuan undang-undang untuk mengosongkan tanah tersebut, tindakan ini difailkan. Plaintif menyatakan bahawa, tanah tersebut telah dipindahmilik kepadanya tanpa syarat dan menafikan bahawa pindahmilik adalah tertakluk kepada mana-mana amanah atau apa jua keadaan. Versi plaintiff di sokong dengan keterangan Lidat anak Ache, Aishah binti Abdullah @ Meling A Juling dan Julita Jidad semua saudara perempuan tiri plaintiff.

Defendan membalas bahawa tanah tersebut pada asalnya dimiliki oleh mendiang neneknya dan telah menyerahkan kepada mendiang ibunya, Marele anak Cyril. Pada ketika itu apabila penguasa tanah dan ukuran hendak mengeluarkan geran hakmilik tanah tersebut, mendiang ibunya telah memberitahu beliau bahawa beliau akan mendaftarkan di bawah nama plaintiff secara sementara bagi pihak dirinya dan saudara kandungnya yang lain dan sebab itulah nama plaintiff tersiar sebagai pemilik tunggal. Selanjutnya beliau menyatakan bahawa beliau tidak pernah membantah kepada pendaftaran tersebut yang mana beliau percaya bahawa beliau dan saudara

- A kandung yang lain mempunyai kepentingan dan hak ke atas tanah tersebut dan plaintif akan memegang tanah tersebut secara amanah untuk mereka. Menurutnya, mendiang ibunya tidak pernah memberitahu mereka tanah tersebut kepunyaan plaintif seorang dan plaintif tidak pernah memberitahunya berkenaan dengan kebenaran lesen sementara secara percuma dan plaintif menggalakkannya
- B dan suaminya untuk membina rumah mereka sendiri (kira-kira 1,260 meter persegi tidak termasuk pokok buah-buahan di atas tanah tersebut) dan beliau juga telah menanam pokok buah-buahan yang telah mengeluarkan hasil bagi beberapa tahun. Versi Welling anak Jidad berkenaan dengan tanah tersebut disokong oleh affidavit Ah Jin anak Suamon, kakak plaintif dan yang pertama yang mana juga menyatakan bahawa plaintif telah menipu ketika menyatakan bahawa beliau memberikan lesen sementara percuma dan beliau (Ah Jin) terkejut apabila menerima surat pengusiran plaintif dan beliau telah mengemukakan kaveat ke atas tanah tersebut yang telah didaftarkan pada 21 November 2005.
- C
- D **Diputuskan**, memerintahkan saman semula ditukarkan kepada tindakan writ dan pihak-pihak mengemukakan pliding mereka menurut O 18 KMT.
- (1) Mahkamah bersetuju dengan hujahan peguam terpelajar bahawa beban adalah di atas seseorang yang menduduki tanah tersebut untuk membuktikan bahawa mereka memiliki lesen atau kebenaran yang dimaksudkan kerana susunan perkataan A 89 k 1 KMT dibaca ' tanpa lesen atau kebenarannya (plaintif) atau mana-mana pendahulu dalam hakmilik'. Tambahan pula s 106 Akta Keterangan 1950 menyediakan bahawa 'apabila mana-mana fakta terutamanya di dalam pengetahuan seseorang, beban untuk membuktikannya adalah keatasnya' (lihat perenggan 3 & 4).
- E
- F (2) Defendan perlu membangkitkan isu-isu yang perlu dibicarakan atau dipertikaikan untuk menentang permohonan plaintif di bawah A 89 KMT yang mana untuk mendapatkan milikan melalui prosedur terus dan yang ditentukan oleh prinsip yang sama di bawah A 14 KMT (lihat kes *Mahkamah Persekutuan Shaheen bt Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 3 AMR 306) (lihat perenggan 5)
- G
- (3) Berdasarkan kepada keterangan afidavit, ianya tidak boleh dinafikan bahawa terdapatnya pertikaian fakta di antara plaintif dan defendan-defendan dan berkenaan dengan ini, mahkamah sedar prinsip yang disokong di dalam *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 berkenaan dengan tanggungjawab hakim bicara berkenaan dengan konflik keterangan afidavit. Perkara pokok dakwaan defendan adalah terdapatnya amanah yang jelas telah dibuat ke atas tanah tersebut bagi pihak saudara kandung apabila tanah tersebut dipindahmilik kepada plaintif oleh mendiang ibu mereka. Walaupun ianya tidak dipertikaikan bahawa tanah tersebut didaftarkan atas nama plaintif sebagai pemilik pada 25hb Mei 1997 tetapi terdapatnya pertikaian berkenaan sama ada plaintif memegang tanah tersebut secara amanah bagi saudara kandungnya (lihat perenggan 12).
- H
- I (4) Menurut s 2 Pemakaian Ordinan Perundangan (Cap 2). Statut penipuan adalah terpakai di Sarawak. Di sini saya bersetuju dengan hujah peguam defendan yang terpelajar, En Jorai bahawa walaupun Statut Penipuan adalah

terpakai di Sarawak dan dengannya satu deklarasi amanah mestilah ditunjukkan dengan jelas secara bertulis, maksud utama adalah peruntukan s 2 yang menyatakan antara lain bahawa 'statut pemakaian am boleh dikuatkuasakan di Sarawak setakat ini hanya kepada keadaan Sarawak dan penduduknya membenarkan dan tertakluk kepada syarat tertentu sebagai keadaan tempatan dan adat tempatan yang perlu' (lihat perenggan 14).

- (5) Pandangan mahkamah berdasarkan kepada kes Lee Phek Choo, mahkamah perlu memberikan perhatian kepada keadaan di Sarawak dan penduduknya termasuk keadaan tempatan dan adat tempatan dalam pemakaian Statut Penipuan di Sarawak. Ianya telah dinyatakan oleh peguam defendan yang terpelajar, pihak-pihak adalah orang tempatan daripada komuniti Bidayuh dan ianya tidak dipertikaikan oleh plaintif. Semenjak terdapatnya pertikaian di antara pihak-pihak berkenaan sama ada tanah tersebut dipegang secara amanah oleh plaintif dan tidak terdapatnya bukti bagaimana amanah terbentuk oleh orang tempatan daripada komuniti Bidayuh, ini dalam pemikiran saya adalah isu yang perlu dibicarakan bagi disuarakan dalam perbicaraan sebenar (lihat perenggan 16).]

#### Notes

For cases on fact especially within knowledge of accused, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 426–448.

For cases on action for recovery of land on unlawful occupation, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4703–4714.

For cases on dispute of facts on summary procedure, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue).

#### Cases referred to

*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)

*E'Singam v Dr Sundram & Ors* [1960] 26 MLJ (refd)

*Foong Seong v Chan San Choon* [1947] 13 MLJ 85 (refd)

*Lim Kim Hua v Ho Chui Lan & Anor* [1995] 3 MLJ 165 (refd)

*Lee Phek Choo v Ang Guan Yau & Anor* [1976] MLJ 146 (refd)

*Shaheen bt Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 3 AMR 306 (refd)

*Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 (refd)

*Ong Ah Moy v Nga Ah Fan & Ors* [1978] 1 MLJ 177 (refd)

*Wilkins & Ors v Kannammal (f) & Anor* [1951] 17 MLJ 99 (refd)

#### Legislation referred to

Application of Laws Ordinance (Cap 2) s 2

Evidence Act 1950 s 106

Rules of the High Court 1980 O 14, O 18, O 28 r 8(1), O 89 r 1

*Tony Ling (H.C. Lee & Partners Advocates) for the plaintiff.*

*Wendy Jorai (Jorai Lisu & Co) for the defendants.*

**A Lau Bee Lan J:**

**B** [1] By an originating summons dated 26 January 2006 (encl 2), the plaintiff is applying for an order to recover possession of all that parcel of land situated at 13 ½ Mile, Kuching/Serian Road, Kuching, containing an area of 6,071 square metres, more or less and described as Lot 725 Block 4 Sentah-Segu Land District ('the said Land') on the ground that the plaintiff is entitled to possession and that the defendant and persons in occupation are without licence or consent pursuant to O 89 of the Rules of the High Court 1980('the RHC').

**C** [2] Order 89 of the RHC provides:

**D** 1. Where a person claims possession of land which he alleges is occupied solely by a person (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

**E** [3] Learned Counsel for the plaintiff, Mr Tony Ling submitted that O 89 of the RHC does not require the applicant to prove but it is merely sufficient if it has been alleged that the persons occupying the land concerned are without licence or consent from him or his predecessor in title and whether the persons occupying the land concerned have such licence or consent are matters within their knowledge. I agree with learned counsel's submission that the burden is on the persons occupying the land to prove that they have such licence or consent because of the wording of O 89 r 1 of the RHC which reads:

**F** without his (plaintiff's) licence or consent or that of any predecessor in title.

**G** [4] Furthermore, s 106 of the Evidence Act 1950 provides that When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. This is best illustrated by illustration (b) of s 106 of the same which states 'A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.'

**H** [5] According to high authority, the defendants have to raise triable or arguable issues to resist the plaintiff's application under O 89 of the RHC which is for obtaining possession by summary procedure and which is governed by the same principles as those under O 14 of the RHC (see Federal Court case of *Shaheen bt Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 3 AMR 306).

**I** [6] The facts of the case as gleaned from five affidavits filed in support of the plaintiff's application and two affidavits filed by the defendants opposing the application. The plaintiff vide her affidavit affirmed on 25 January 2006 deposed that she is the sole registered proprietor of the said land as evident by exh 'R-1', the issue document of title and by virtue of the Memorandum of Transfer and Partition on 27 June 1997; and that the defendant is her elder sister who was staying with her

immediate family at a small portion of the said Land before the said Land was transferred to the plaintiff by her late mother. The plaintiff stated that after she became the registered proprietress of the said land she granted a temporary gratuitous licence to the defendant and her family to stay and occupy a small portion on the said land strictly on condition that the said temporary gratuitous licence was terminable at will. According to the plaintiff, sometime in the month of June, she informed the defendant and her immediate family to leave the said land and she intended to sell it but despite reminders the defendant and her family refused to vacate the said land. Thereafter, upon instruction by the plaintiff, Messrs H.C. Lee & Partners Advocates vide a letter dated 19 October 2005 wrote to the defendant to vacate the said land which they refused and then again on 12 October 2005. Both the said letters are exhibited as exh 'R-2' annexed to the affidavit of the plaintiff affirmed on 25 January 2006.

[7] The plaintiff in the affidavit in reply affirmed on 10 March 2006 deposed that the said Land was part of a bigger piece of land in which her late mother has a share which was then described as Lot 11 Block 4 Sentah-Segu Land District together with a few other co-proprietors. When the said land was transferred to the plaintiff, it was in the form of her mother's share in the said Lot 11 Block 4 and at all material times, the document of title of the said Lot 11 Block 4 was already issued. It is only later that all the registered co-proprietors of the said Lot 11 Block 4 agreed that the land be subdivided and partitioned and the subdivided lots be transferred to the respective co-proprietors. In 1997, the said Lot 11 Block 4 was duly partitioned, subdivided and the plaintiff's entitlement which is the said land was duly transferred to her as the sole proprietress. The plaintiff denied that the said land was transferred to her by her late mother subject to any trust of whatsoever nature. According to the plaintiff, her late mother transferred the said land to her because she knew that the plaintiff would look after and take care of her and her elder half-sister, Felling Anak Jidad who is mentally impaired and her late mother made it known to the rest of her siblings that the transfer to her was absolute and without any conditions of any nature whatsoever. Plaintiff further stated that her late mother stayed with her in Kuala Lumpur from 1994 to the year 2002 when she returned to Kuching, Sarawak. Whilst in Kuala Lumpur, she looked after her by providing accommodation, food and all the other necessities. When she went back to Kuching, she was staying at a house next to the defendant's (Welling) house on the said land and she was relatively well until the month of August 2003 when she fell ill and she passed away in the month of September 2003. It is not true that her late mother was sick for many years as alleged and as stated aforesaid, she became sick in August 2003 and passed away in September 2003. When her late mother came back to Kuching, she paid a monthly sum of RM300.00 to the defendant (Welling), RM200.00 for her late mother's living expenses and RM100.00 to the defendant (Welling) for taking care of her late mother's living expenses and RM100.00 to the defendant (Welling) for taking care of her late mother. Even before the said land was transferred to her and even when her late mother was not staying with her, she sent monies to her monthly for daily expenses and needs.

[8] The plaintiff's version is supported by the evidence of Lidat Anak Ache, Aisah binti Abdullah @ Meling A Juling and Julita Jidad, all half sisters of the plaintiff.

- A** In fact, according to Lidat when she heard about the transfer of the said land to the plaintiff, it worried her and her family but since they were staying on the said land since 1963 in a concrete house with five bedrooms which was built by her husband and herself; she had asked permission from the plaintiff whether they could stay on the said land and was told that they could do so, so long as the plaintiff did not sell the said land; and she was informed by the plaintiff sometime in October 2005 of the intended sale and was asked to deliver vacant possession of the said land which she (Lidat) agreed.
- B**

- C** [9] Through the affidavit of Welling anak Jidad, the half sister of the plaintiff, the defendants contended that the said land originally belonged to her late grandmother and which was passed to her late mother, Marele anak Cyril. At that time when the Superintendent of Lands and Surveys wanted to issue the document of title of the said land, her late mother informed her that she would register under the plaintiff's name temporarily on behalf of her and her other siblings and that is the reason, the plaintiff's name appeared as the sole proprietor. She further stated she had never objected to this registration as she honestly believed that she and her siblings have interests and rights on the said Land and that the Plaintiff would hold the said Land in trust for them. According to her, her late mother never told them the said land belonged to the plaintiff alone and the Plaintiff never informed her about granting temporary gratuitous licence and the plaintiff encouraged her and her husband to build their own house (of about 1,260 square metres not including the fruit trees on the said land) and she even planted fruit trees that yielded fruits for many years. According to her before her late mother died in year 2003 she was very sick for many long years and she was the only person who took care of her. The plaintiff left their ancestral home on the said land for more than 20 over years to Miri and West Malaysia and therefore leaving her alone tending her late mother until she passed away in 2003 on the said land. And for that reason her other siblings who also has beneficial interest and rights on the said land never objected of her staying on the said land. Further, she stated she was shocked to receive a letter from the plaintiff's counsel instructing her to vacate the said land which she had stayed from 1964 till to date (6 March 2006 date of affirmation of affidavit of Welling anak Jidad).
- D**
- E**
- F**

- G** [10] Welling anak Jidad's version regarding the said land is supported by the affidavit of Ah Jin anak Suamon, the elder sister of the plaintiff and the former. Further, Ah Jin deposed that Welling stayed on the said land from 1964 till to date (6 March 2006 date of affirmation of Ah Jin's affidavit) and took care of their late mother till she passed away in 2003. Plaintiff was lying in stating that she granted temporary gratuitous licence and she (Ah Jin) was dismayed upon receiving the plaintiff's letter of eviction and she had lodged a caveat on the said land registered on 21 November 2005 (exh 'A' annexed to Ah Jin's affidavit).
- H**

- I** [11] Learned counsel for the plaintiff submitted that there is no merit in the defendants' assertion that the plaintiff was in fact holding the said land in trust for her siblings as there is no reason for the omission of the siblings' names upon sub-division and partition of the Lot 111 Block 4 which was carried out in 1997 and there has been no protest from the defendants all this while. Further, learned counsel for the plaintiff submitted that even if the defendants were speaking the truth, no

trust was created as there was no writing to manifest the declaration of trust. For this proposition, the learned counsel for the plaintiff relied on *Lee Phek Choo v Ang Guan Yau & Anor* [1976] MLJ 146 where the Federal Court held that the Statute of Frauds applied to Sarawak and as there was no writing to manifest the declaration of trust, it could not be that a trust was created in respect of the proprieties. The stand of the learned counsel for the defendants, essentially is since there is dispute of facts which can only be established by the examination and cross-examination of witnesses, the proper procedure to be adopted by the plaintiff is to take out a writ and submit that the court should invoke O 28 r 8(1) of the RHC and cited several cases in support (see *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217, *Ong Ah Moy v Nga Ah Fan & Ors* [1978] 1 MLJ 177, *E'Singam v Dr Sundram & Ors* [1960] 26 MLJ, *Foong Seong v Chan San Choon* [1947] 13 MLJ 85, *Lim Kim Hua v Ho Chui Lan & Anor* [1995] 3 MLJ 165 and *Wilkins and Others v Kannammal (f) and Anor* [1951] 17 MLJ 99).

[12] Based on the affidavit evidence, it cannot be denied that there is a dispute of facts between the plaintiff and the defendants and in this regard, I am mindful of the principle advocated in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 regarding the duty of the trial judge pertaining to conflicting affidavit evidence. The crux of the defendants' allegation is that there is an expressed trust created over the said land on behalf of the siblings when the said land was transferred to the plaintiff by their late mother. Although it is not disputed that the said land is registered in the name of the plaintiff as proprietor on 22 May 1997 but there is a dispute regarding whether the plaintiff held the said land in trust for her siblings. According to the case of *Foon Seong v Chan San Choon* [1947] 13 MLJ 85 where the plaintiff took out an originating summons in order to obtain for the transfer to himself certain shares standing in the name of one Foong Onn Kwan (deceased) as the plaintiff alleged those shares were bought by him and held in trust for him by the said Foong Onn Kwan. The court dismissed the application on the ground that the procedure was incorrect and at p 86 referred to 'Daniell's, Chancery Practice, (8th Ed) Vol 1, p 865 and of the cases there referred to makes it clear that this procedure by way of this nature. What the plaintiff is really asking is for a decision as to whether there was a valid trust by Foong Onn Kwan, deceased in favour of the plaintiff. Mr MacDuff was unable to cite any authority to show that procedure by way of originating summons under s 467(i) was an appropriate form of procedure such a matter and I am of opinion that his application is misconceived, and that a plaintiff cannot in an originating summons based on an alleged Trust ask for evidence to be heard to prove that Trust. Moreover, the question at issue is a question of fact and not of law and will have to be determined in Open Court and is not suitable for determination by the procedure of an originating summons. Although the learned counsel for the plaintiff sought to distinguish Foon Seong's case on the ground that the case dealt with shares and not land as in the present case, I find that the distinction cannot be sustained as the principle in Foon Seong deals with the issue of declaration of trust and therefore it is applicable in the context of the present case.

[13] It is not disputed by both the learned counsel that the Statute of Frauds apply to Sarawak and that it is an act of general application. At this juncture, it is pertinent for me to refer to a passage regarding the basis for the Federal Court's rationale why

- A a declaration of trust has to be writing based on the Statute of Frauds in *Lee Phek Choo's case* when Lee Hun Hoe C.J. (Borneo) (as he then was) at p 147 paragraphs A to D opined

Halsbury's Laws of England, 3rd Ed, Vol. 38 at p 830 paragraph 1388 states that:

- B A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his will.
- This is based on the Statute of Frauds which is a statute of general application and is applicable in Sarawak by virtue of section 2 of the Application of Laws Ordinance (Cap 2) which reads as follows:
- C 2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:
- D Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary (Emphasis added).

- E [14] By virtue of s 2 of the Application of Laws Ordinance (Cap. 2), the Statute of Frauds is applicable to Sarawak. Here, I agree with the submission of the learned counsel for the defendants, Ms Jorai that even though the Statute of Frauds is applicable to Sarawak and whereby a declaration of trust must be manifested in writing, of great significance is the proviso to s 2 which states, inter alia, that 'statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.' It is to be observed that after considering the said Statute of Frauds in the context of s 2 of the Application of Laws Ordinance (Cap. 2) as referred to in His Lordship's judgment which I have stressed above, Lee Hun Hoe C.J. (Borneo) (as he then was) at p 147 paragraph E further opined, 'That this is the position is indicated in *Chin Yuk Kon v Chop Koong Onn* [1949] S.C.R. 19' and referred to the judgment of Lascelles J at p 20:
- G

This is an alleged contract of guarantee and the position is governed by the provisions of the Statute of Frauds. ...

- H I am satisfied that there is in the sphere of guarantee an accepted and general usage, uniform and universal in Sarawak among Chinese. I have come to the conclusion that I must recognise such custom to the extent that it enables me to hold the 'chopped' bill to constitute sufficient memorandum to satisfy the provisions of the Statute of Frauds."

- I [15] In *Chin Yuk Kon's case*, a case tried with assessors, one person by the name of Shoon Ngee ordered certain goods from the plaintiff's firm (*Chin Yuk Kon*), took delivery of them and made certain payments towards the cost. A bill for these goods was made out by the plaintiff to the defendant and the defendant applied his 'chop' to the bill which was returned to the plaintiff. The translated heading of the bill is 'Chop Koong Onn [defendant] acknowledged for Shoon Ngee'. The defendant

admitted applying his chop but maintained that this was merely to certify to the plaintiff that Shoon Ngee was a man of good character. The assessors stated that if the defendant's explanation was accepted by the Court serious trouble would arise in Chinese business circles in Sarawak as it was a recognised usage of Chinese trade that the application of one's 'chop' to a bill for goods supplied to another guarantees payment for those goods. The learned judge gave judgment for the plaintiff after recognising that there is 'in the sphere of guarantee an accepted and general usage, uniform and universal in Sarawak among Chinese' and concluded that he 'must recognise such custom to the extent that it enables him to hold the 'chopped' bill to constitute sufficient memorandum to satisfy the provisions of the Statute of Frauds.

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I am of the view that in referring to the abovesaid dicta of the learned Judge in Chin Yuk Kon's case, immediately after referring to s 2 of the Application of Laws Ordinance (Cap 2), the Federal Court takes cognisance of local usage in its application to the Statute of Frauds albeit that Chin Yuk Kon's case is a case relating to contract.

C

[16] In my opinion, based on *Lee Phek Choo's case* the Court has to give due regard to the circumstances in Sarawak and of its inhabitants including local circumstances and native customs in the application of the Statute of Frauds in Sarawak. It has been pointed out by the learned counsel for the defendants, the parties are natives from the Bidayuh community and which is not denied by the plaintiff. Since there is a dispute between the parties regarding whether the said land is being held in trust by the plaintiff and there is no evidence of how a trust is created by natives from the Bidayuh community, this to my mind is a triable issue to be ventilated at a trial proper.

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[17] It is appropriate at this juncture to refer to the rationale behind the introduction of O 89 of the RHC. Gopal Sri Ram JCA at p 479 in *Cheow Chew Khoo's case* had stated that O 89 of the RHC is [A] summary procedure meant primarily for the eviction of squatters. For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the rules committee passed O 89". Bearing in mind the dictum of Gopal Sri Ram JCA and the fact that the plaintiff has stated that she does not have all the names of all the persons in the unlawful occupation of the said land and in the exercise of my discretion pursuant to O 28 r 8(1) of the RHC order that the originating summons be converted into a writ action and the parties do deliver their pleadings in accordance with O 18 of the RHC.

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*Costs to follow the event.*

Reported by Navit Kaur Randhawa

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